

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYIn the Matter of)
)
)Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)
)

PP Docket No. 93-253 ✓

REPLY COMMENTS OF *CALL-HER*, L.L.C.

CALL-HER, L.L.C. ("*Call-Her*") hereby submits its reply comments on the Federal Communications Commission's ("FCC") Notice of Proposed Rulemaking ("NPRM") to establish competitive bidding rules for awarding radio spectrum licenses. In its initial comments *CALL-HER* addressed the implementation of the FCC's statutory mandate to provide women-owned businesses a realistic opportunity to participate in the provision of spectrum based services. *CALL-HER* urged the Commission specifically to authorize women-owned businesses to: (1) bid for spectrum set aside for designated entities; (2) pay their winning bid prices in installments, waive the requirement for an upfront payment and award tax certificates to businesses owned by women; and (3) adopt the National Women's Business Council's definition of women-owned business.

The comments submitted in response to the NPRM provide a record sufficient to withstand any constitutional challenge to

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preferential payments plans, spectrum set asides and specific bidding rules for women-owned businesses. Specific rule provisions are warranted both as remedial measures to address discrimination against women and as substantially related means to promote a government interest.

I. SIGNIFICANT BARRIERS TO CAPITAL EXIST FOR WOMEN-OWNED BUSINESSES.

Comments filed by other parties confirm the capital intensive demands of the telecommunications industry and the barriers that these demands present to women's participation in the ownership of telecommunications companies. Existing dominant telecommunications carriers recognize this barrier and encourage the Commission to adopt preferential payment plans. NYNEX ascribes the lack of designated entities in the telecommunications industry to "the inability of designated entities described in the legislation, to make the necessary investment commitments."^{1/} Accordingly, NYNEX encourages the Commission to award designated entities a preference focused on financial opportunities. AT&T encourages the Commission to design a group of financial "enabling devices" to help designated entities overcome the capital formation difficulties historically experienced by designated entities.^{2/}

The wealth of evidence submitted by American Women in Radio and Television ("AWRT"), combined with the statistics submitted

^{1/} See Comments of NYNEX at 19.

^{2/} See Comments of AT&T at 24.

by Call-Her, provide a sufficient record of the exclusion of women-owned businesses from the telecommunications industry and discrimination against women in the financial markets. The Congressional Caucus on Women's Issues (the "Caucus") identifies as one of the greatest obstacles faced by women entrepreneurs the ability to obtain the necessary credit to start or expand their ventures.^{3/} The Caucus cites a study by the National Foundation for Women Business Owners that found that 76% of its members had to rely at least in part on personal capital to finance their business start-ups and that 38% lacked commercial credit entirely. The Caucus attributes the difficulties women face in raising capital to the types of businesses that banks are willing to finance and *sexual discrimination in commercial lending*.^{4/} The Government, by permitting women to pay the bid price in installments, can help eradicate this discrimination against women by providing financing to women-owned businesses. By authorizing women-owned businesses to pay their bid price in installments, the Federal government in essence will finance the acquisition of spectrum.^{5/}

^{3/} See *Comments of AWRT* at Exhibit 4, p.2.

^{4/} *Id.*

^{5/} *CALL-HER* strongly opposes the suggestion by BellSouth that designated entities be required to execute personal guarantees for the bid price. *Comments of BellSouth* at n.38. The financial commitment of a corporate entity should not be measured by the principals' willingness to sacrifice their home or personal assets. Furthermore, such a requirement would require a personal sacrifice not required by other bidders.

CALL-HER has analyzed the costs of purchasing the equipment to deploy a PCS system in a metropolitan area serving an initial customer base of 5,000 and estimates that the costs would approximate \$5-7.5 million, *excluding the cost of spectrum*. These capital requirements alone present a challenge for women-owned businesses. Only armed with the ability to prorate its spectrum payments over time and other favorable conditions, such as the spectrum set asides, will women-owned businesses have a realistic opportunity to participate in PCS.

**II. SPECTRUM MUST BE SET ASIDE FOR BIDDING
SOLELY BY DESIGNATED ENTITIES.**

The Commission's proposal to set aside two channel blocks for bidding by designated entities recognizes the reality in the market -- that not all bidders are equipped with equivalent resources. The economic theory that goods are evaluated based on demand and at a price equivalent to their value does not account for the "externality" of gender discrimination. Women-owned businesses can not compete against non-designated entities for spectrum and win due to their more limited access to capital. Accordingly, a set aside of spectrum for bidding solely by designated entities is appropriate.

A spectrum set aside is authorized by the Omnibus Budget Act of 1993 (the "Budget Act"). The Budget Act does not circumscribe the Commission's authority in making bandwidth assignments or adopting procedures that ensure that businesses owned by women have an opportunity to participate in spectrum-based services. Indeed, the Budget Act vests the Commission with broad authority

to fashion competitive bidding rules that fulfill the statute's mandate. Specifically, Section 309(j)(4) of the Budget Act requires the Commission to prescribe area designations and *bandwidth assignments* that promote

(ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies and businesses owned by members of minority groups and women.

The FCC further is authorized to use any procedures to ensure participation by women in the provision of spectrum-based services:

[the Commission shall] ensure that small businesses, rural telephone companies and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum based services, and for such purposes, consider the use of tax certificates, bidding preferences *and other procedures*

III. COMPETITIVE BIDDING RULES THAT SET ASIDE SPECTRUM FOR BIDDING BY ALL DESIGNATED ENTITIES AND THAT PERMIT WOMEN-OWNED COMPANIES TO PAY THEIR WINNING BID IN INSTALLMENTS ARE SUBSTANTIALLY RELATED TO A SIGNIFICANT GOVERNMENT OBJECTIVE.

The promotion of economic opportunities for women in providing spectrum-based services is a legitimate government objective that can be achieved through spectrum set aside for bidding by designated entities, including women-owned businesses, and competitive bidding rules that provide for installment payments. *CALL-HER* concurs with and endorses *AWRT's* legal analysis of the constitutionality of gender-based preferences in a competitive bidding licensing process. As the cases cited in *AWRT's* comments demonstrate, promoting economic opportunity is an important government interest. See *Califano v. Webster*, 430 U.S.

313 (1977); *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); *Coral Construction Co. v. King County*, 941 F.2d 910-932 (9th Cir. 1991).

Competitive bidding rules that are structured to permit businesses owned by women to bid against other designated entities only and to pay their bid price in installments are substantially related to this objective.

Policies that promote participation by women-owned companies to ensure they are not shut out of spectrum licensing by competitive bidding are supported fully by the Budget Act and the policies of the Clinton Administration. In the President's Progress Report: *Technology for Economic Growth: President's Progress Report*, the Clinton Administration expressed its concurrent support for competitive bidding and for policies that support the participation of women-owned businesses in spectrum auctions:

The Administration has pledged support for greater reliance on market principles in distributing spectrum among the widely differing wireless services that will be part of the NII. At the same time, the Administration will promote policies to ensure that entrepreneurs and small, rural, and minority- and women-owned businesses are able to participate in spectrum auctions.^{6/}

The policies of promoting competitive bidding while incorporating regulatory incentives to address inequalities that still exist in the marketplace are consistent and constitutional.

^{6/} *Technology for Economic Growth: President's Progress Report* at 45.

IV. THE RULE PROVISIONS FOR DESIGNATED ENTITIES SHOULD NOT BE SEVERABLE FROM THE COMPETITIVE BIDDING RULES GENERALLY.

Any challenge to the competitive bidding rules' provisions for designated entities must be considered a challenge to the competitive bidding rules generally. MCI requests that the Commission specify that any set asides adopted to implement the Act's requirements for minority and women-owned companies be explicitly designated as severable from the other rules adopted for competitive bidding.^{1/} Severability of the rules, however, would encourage litigation of the rules validity for the mere sake of delaying these entities entrance into the industry. A declaration that the rules are severable will provide spectrum winners with an incentive to challenge this portion of the rules to minimize competition. This delay would impose an additional significant disadvantage on women-owned businesses. Accordingly, any challenge to this portion of the rules should stay implementation of the competitive bidding process generally to inhibit frivolous litigation.

V. CONCLUSION.

The Commission is on the verge of licensing a new industry that provides a wealth of opportunity for innovation, growth and economic development. These opportunities represent a unique opportunity for women-owned businesses to assume an ownership position in the telecommunications industry. The opportunity will be lost for PCS and other spectrum-based services unless the

^{1/} See Comments of MCI at 15.

competitive bidding rules are structured to recognize the barriers to capital that women-owned businesses of all sizes face in the private financial markets. The structure of the competitive bidding rules is critical to the future of women in telecommunications ownership. The FCC should not turn a deaf ear to that need nor should it shy from gender-based preferences that are amply supported by the record and substantially related to the legitimate government interest of providing economic opportunity for women.

Respectfully submitted,

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